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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

BZ

11
12 LELAND H. BRAY,
13 Plaintiff,

CASE NO. _____

08

0535

14 vs.

15 MESSMORE KENDALL, HONEY
16 TAYLOR, MESSMORE KENDALL III,
17 ALEXANDER KENDALL,
and DOES 1 through
100, inclusive,

**COMPLAINT FOR DAMAGES,
SPECIFIC PERFORMANCE,
AND DECLARATORY RELIEF**

DEMAND FOR JURY TRIAL

18 Defendants.
19 _____/

20
21 COME NOW, Plaintiff Leland H. Bray who alleges as follows:

22 **PARTIES**

23 1. Plaintiff Leland H. Bray ("Plaintiff") is individual
24 who is a citizen of the United States and who resides in
25 California. Plaintiff was married to Arline Bray ("Arline") who
26 passed away on October 5, 2007 and Plaintiff has succeeded to
27 Arline's interest with respect to the matters that are the
28 subject of this complaint.

1 2. Plaintiff is informed and believes and on that basis
2 alleges that defendants Messmore Kendall ("Kendall"), Honey
3 Taylor ("Taylor"), Messmore Kendall III ("Kendall III"), and
4 Alexander Kendall ("Alexander") are citizens of the United
5 States. Plaintiff is informed and believes and on that basis
6 alleges that each of said defendants resides in a state other
7 than California and do not reside in Mexico.

8 3. Defendants Does 1 through 100, inclusive, are sued
9 herein under fictitious names, their true names and capacities
10 being unknown to Plaintiff. Plaintiff is informed and believes
11 and on that basis alleges that each of the fictitiously named
12 Defendants is in some manner legally responsible for the events
13 and damages plaintiff alleges in this complaint, contributed to
14 the wrongs and damages alleged herein, or claim a legal or
15 equitable right, title, stake, lien, or interest in the
16 properties which are the subject of this action. Plaintiff will
17 amend this complaint to allege their true names and capacities,
18 and any additional allegations, when they are ascertained by
19 Plaintiff.

20 4. Plaintiff is informed and believes and on that basis
21 alleges that each defendant was the agent and/or employee and/or
22 principal of each of the remaining defendants, and in doing the
23 acts herein alleged, was acting within the course and scope of
24 such agency and employment, and/or with the knowledge, consent,
25 authority of each of the remaining defendants and/or with
26 knowledge of their acts and/or wrongdoing. By virtue of the
27 foregoing, each defendant had knowledge and constructive notice
28 of, and/or authorized and consented to the acts of each of the

1 other defendants, and/or ratified the wrongful acts of each of
2 the other defendants, as herein alleged by among other things,
3 retaining and sharing in the benefits of said acts.

4 5. Plaintiff is informed and believes and on that basis
5 alleges that Defendants and each of them, knowingly and willfully
6 entered into an agreement or agreements and conspiracy or
7 conspiracies with the other defendants or aided and abetted the
8 other defendants to do all or some of the acts herein alleged.

9 JURISDICTION AND VENUE

10 6. This Court has person jurisdiction over the Defendants
11 named herein because the wire transfer which paid for the
12 property at issue, which has not been transferred to Plaintiff,
13 originated in California and that there is complete diversity of
14 citizenship between Plaintiff and the Defendants and the damages
15 sought exceed \$75,000. This is an action for Civil RICO under 18
16 U.S.C. §1962, as well as pendent state claims. This Court has
17 subject matter jurisdiction pursuant to 28 U.S.C. §1331 (federal
18 question), 28 U.S.C. §1332 (diversity) and 28 U.S.C. §1367
19 (supplemental jurisdiction).

20 GENERAL ALLEGATIONS

21 7. Kendall was the owner of a single family residential
22 house known as Casa Abanico Verde located at Calle Cuauhtemoc
23 number 560, Colonia El Cerro, Puerto Vallarta, Jalisco, Mexico
24 ("the Property") pursuant to a Bank Trust with HSBC, formerly
25 Bitel, a Mexican bank and defendants Taylor, Messmore III and
26 Alexander are subsequent beneficiaries of the Trust in the event
27 of Kendall's death.

28 8. Plaintiff is informed and believes and on that basis

1 alleges that Kendall listed the Property for sale with Silvia
2 Elias ("Elias"), David Pullen ("Pullen"), who are husband and
3 wife, and/or PV Real Estate ("PV"), a business entity owned by
4 Elias and Pullen.

5 9. Prior to being shown the Property, Plaintiff and Arline
6 (collectively "Brays") met with Elias and Pullen in their office
7 and Elias and Pullen presented themselves as professional, well
8 informed and experienced in transactions involving the transfer
9 of property in Mexico to American citizens. On December 3, 2003,
10 the Brays met with Elias and Elias advised the Brays of her
11 personal relationship with Kendall and her personal knowledge of
12 the Property, including her familiarity with the engineer who
13 constructed it and several other houses in the area. The Brays
14 had earlier also viewed their website which portrays them as
15 having a long history of success, experience and knowledge of the
16 local real estate market, the laws of Mexico pertaining to real
17 estate transaction, their employee's commitment to honesty and
18 integrity and their legal expertise in handling transactions
19 involving American citizens.

20 10. On or about December 2, 2003, the Brays, who were not
21 then familiar with real estate laws, procedures and requirements
22 of State of Jalisco and the Puerto Vallarta area relied upon
23 Elias, in particular, and Pullen, in general, and made an offer
24 to purchase the Property after Elias had suggested that \$10,000
25 be deducted from the asking price and Kendall accepted the Brays'
26 offer.

27 11. Elias and Pullen, who held themselves out as being
28 experience and knowledgeable regarding transactions involving

1 United States citizens, then assumed complete control of the
2 transaction by preparing the contract of sale and an escrow was
3 opened at First American Title Company ("First American") in
4 Sunrise, Florida. The contract of sale provided, in pertinent
5 part, that the parties were to diligently provide the notary with
6 data and documents required to consummate the transaction.

7 12. Plaintiff is informed and believes and on that basis
8 alleges that unbeknownst to the Brays, Kendall had been working
9 in concert with Elias and Pullen to evade paying Mexican capital
10 gains tax on the sale of the Property.

11 13. Plaintiff is informed and believes and on that basis
12 alleges that, contrary to normal custom and practice of Elias and
13 Pullen, the contract and escrow instruction prepared by said
14 defendants omitted any mention of capital gains and fixed a
15 specific date for closing of the sale without making any
16 provision for extending the time for the closing of the escrow in
17 the event such was necessary.

18 14. The Brays were unaware of these problems with the
19 contract and escrow instructions and therefore they signed and
20 returned them to Elias and PV on December 17, 2003.

21 15. On or about December 22, 2003, Elias faxed the escrow
22 instructions to the escrow holder and demanded that the Brays
23 send the 10% deposit and thereafter the Brays wire transferred
24 from California into an escrow at First American Title Insurance
25 Company ("First American") in Sunrise, Florida, a 10% guaranteed
26 deposit of \$44,000 and a \$500 escrow fee in accordance with the
27 contract.

28 16. Nothing further was done until on or about February 6,

1 2004, when Kendall requested an irrevocable "Poder" or power of
2 attorney from Notary #10, German Goldman Sarafin, which
3 apparently rendered Kendall ineligible to do anything further
4 with respect to the Property. Pursuant to the Kendall's Poder,
5 Maria Wong Meza ("Meza") became Kendall's attorney in fact for
6 purposes of the sale of the Property to the Brays.

7 17. Plaintiff is informed and believes and thereon alleges
8 that Kendall's Poder falsely stated that Kendall was legally in
9 Mexico and inferred that he had an immigration status that would
10 exempt him from capital gains tax in connection with the sale of
11 the Property. In fact, Kendall's Migratory Document, which was
12 presented to the Notary #10, did not confer migratory status that
13 would exempt him from paying Mexican capital gains tax expired
14 and in fact the Migratory Document had expired on November 10,
15 2000.

16 18. Plaintiff is informed and believes and on that basis
17 alleges that on or about February 9, 2004, Meza, as Kendall's
18 attorney in fact, contrary to normal custom and practice, did not
19 sign the cesion of rights, which would have terminated Kendall's
20 interest in the Property. Instead, on February 10, 2004, a
21 cession of rights signed by Kendall and delivered to HSBC Bank,
22 the financial institution, which had recently acquired Bitall
23 Bank, the trustee, and would be holding the Property in a Bank
24 Trust for the Brays as required by Mexican law.

25 19. Unbeknownst to the Brays, HSBC Bank had and has not
26 approved the cesion of rights because it has not been signed by
27 Meza as Kendall's attorney in fact. Instead, Elias and Pullen
28 concealed from the Brays that HSBC had not accepted and signed

1 the cession of rights and was not preparing the bank trust on the
2 Property in favor of the Brays so that all the Brays funds for
3 the purchase of the Property would be transferred from the Brays'
4 accounts in California to First American in Florida.

5 20. Plaintiff is informed and believes and on that basis
6 alleges that on or about February 10, 2004, Elias, knowing that
7 HSBC could not issue a letter of acceptance of the cession
8 request that had been sent that day and was not signed by Meza,
9 instructed First American, contrary to the original instructions
10 which provided for disbursement on February 17th, to disburse the
11 escrow funds immediately and the Brays agreed to this changed
12 believing that HSBC Bank had approved the cession letter and
13 Kendall had paid the capital gain tax or met the requirements for
14 an exemption and that all other conditions for the transfer of
15 title to the Brays had been met. The Brays signed all required
16 documents and even though Plaintiff is informed and believes and
17 on that basis allege that although Kendall was in Puerto Vallarta
18 at the time, Meza appeared on Kendall's behalf, unbeknownst to
19 the Brays did not sign the cession of rights.

20 21. As a result of the foregoing, the Brays signed all of
21 the documents necessary to be signed on their behalf and other
22 unnecessary documents, which defendants requested they sign,
23 which enabled Kendall, Elias, Pullen and PV to get the money from
24 escrow immediately. Prior to February 13, 2004, the Brays' bank
25 in California wire transferred the remaining \$400,000 to escrow
26 holder First American in Sunrise Florida and the \$440,500 was
27 disbursed before Kendall turned over possession of the Property
28 to the Brays on February 16, 2004. In fact, on February 13, 2004,

1 Elias and Pullen and/or Kendall had faxed forged documents
2 purportedly signed by the Brays to First American.

3 22. Due to no fault of the Brays, the Bank Trust was not
4 issued and then Notary #7, Elias Amezcua Gonzalez, who had been
5 responsible for pursuing that matter withdrew the title due to
6 the failure of the HSBC to sign the cesion of rights and the file
7 was placed with a new notary, Notary #5, Carlos Castro Segundo,
8 to consummate the transaction.

9 23. Plaintiff is informed and believes and on that basis
10 alleges that Kendall at the direction of Elias and Pullen,
11 substituted Meza in place of himself to sign the title was to
12 conceal the fact that he was not legally entitled to exemption
13 from Mexico's capital gain tax and that Elias and Pullen have
14 directed Kendall and Meza not to sign any documents because she
15 fears that her wrongful conduct will be revealed.

16 24. Up until the middle of December 2007, Defendants, and
17 each of them, through their agents have promised to cooperate
18 with Plaintiff, but now it appears clear that unless Plaintiff
19 agrees to the insertion of a clause in the title that Plaintiff
20 or any subsequent buyers will be responsible for any capital
21 gains tax that Kendall may be found to be liable for in the
22 future, contrary to the Mexican law which requires the capital
23 gains tax to be paid by the seller in the absence of an agreement
24 to the contrary.

25 25. As a result of the foregoing, Plaintiff is informed and
26 believes that despite having paid over \$440,000, defendants
27 remain the beneficial owners of the Property.

FIRST CAUSE OF ACTION
(Fraud)

26. Plaintiff realleges and incorporates by reference the allegations contained in all paragraphs above, as though fully set forth herein.

27. Plaintiff is informed and believes and on that basis alleges that defendants knowingly designed the subject transaction in such a manner as to relieve Kendall of the obligation of paying any capital gains taxes either in Mexico or the United States.

28. At the time that the Brays made the offer to the present, defendants, and each of them, provided false information regarding Kendall's immigration status, HSBC's acceptance of the cession of rights and was preparing the Bank Trust on the Property in favor of the Brays, and that everything had been done or would be done to consummate the sale.

29. At the time defendants, and each of them, made these representations, defendants had no intention of transferring the Property unless the Brays paid Kendall's capital gain tax.

30. The representations were made with the intent to induce the Brays to disburse the purchase price prior to obtaining title to the Property and then force the Brays to pay any capital gains taxes if they wanted to have title transferred.

31. Defendants, and each of them, knew these representations were false at the time they were made or made the false representations in reckless disregard of the truth.

32. Defendants, and each of them, intended that the Brays rely on the misrepresentations.

1 33. The Brays reasonably relied on defendants'
2 misrepresentations.

3 34. As a direct and proximate and foreseeable result of
4 defendants' concealment and misrepresentations, Plaintiff has
5 suffered economic damages in an amount to be proven at trial.

6 34. As a further direct, proximate, and foreseeable result
7 of the conduct of defendants, as set forth above, Plaintiff has
8 suffered and continues to suffer from humiliation, mental
9 anguish, fear, and emotional and physical distress, all to his
10 damage in an amount to be proven at trial.

11 35. Defendants, and each of them, acted with fraud, malice
12 and in conscious disregard for the rights of Plaintiff thereby
13 entitling Plaintiff to punitive damages in an amount to be proven
14 at trial.

15 **SECOND CAUSE OF ACTION**
16 (Concealment)

17 36. Plaintiff realleges and incorporates by reference the
18 allegations contained in all paragraphs above, as though fully
19 set forth herein.

20 37. Defendants, and each of them, concealed certain
21 material facts from the Brays regarding the subject transaction
22 including, but not limited to Kendall's immigration status,
23 Kendall's liability for payment of capital gains taxes in
24 connection with the subject transaction and HSBC's actions with
25 respect to the cession of rights document and the Bank Trust on
26 the Property in favor of the Brays.

27 38. Defendants, and each of them, were under a duty to
28 disclose the facts to the Brays as they were within defendants'

1 knowledge and not the knowledge of the Brays.

2 39. Defendants, and each of them, concealed or suppressed
3 the facts with the intent to defraud.

4 40. The Brays were unaware of the facts and reasonably
5 relied on defendants' deception in proceeding with the
6 transaction.

7 41. As a direct and proximate and foreseeable result of
8 defendants' concealment and misrepresentations, Plaintiff has
9 suffered economic damages in an amount to be proven at trial.

10 42. As a further direct, proximate, and foreseeable result
11 of the conduct of defendants, as set forth above, Plaintiff has
12 suffered and continues to suffer from humiliation, mental
13 anguish, fear, and emotional and physical distress, all to his
14 damage in an amount to be proven at trial.

15 43. Defendants and each of them acted with fraud, malice
16 and in conscious disregard for the rights of Plaintiff thereby
17 entitling Plaintiff to punitive damages in an amount to be proven
18 at trial.

19 **THIRD CAUSE OF ACTION**
20 (Negligent Misrepresentation)

21 44. Plaintiff realleges and incorporates by reference the
22 allegations contained in all paragraphs above, as though fully
23 set forth herein.

24 45. Defendants, and each of them, falsely represented to
25 the Brays, among other material facts, that Kendall had an
26 immigration status in Mexico that exempted him from paying
27 Mexican capital gains taxes on this transaction, that the HSBC
28 accepted and signed the cesion of rights and was preparing the

1 Bank Trust on the Property in favor of the Brays, and that before
2 the Brays wired the remaining funds to Kendall that all things
3 necessary to consummate the transaction had been or would be
4 completed.

5 46. Defendants, and each of them, had no reasonable basis
6 for believing that the representations were true when the
7 representations were made.

8 47. Defendants, and each of them, intended that the Brays
9 rely on the misrepresentations.

10 48. The Brays reasonably relied on the misrepresentations.

11 49. As a direct and proximate and foreseeable result of
12 defendants' concealment and misrepresentations, Plaintiff has
13 suffered economic damages in an amount to be proven at trial.

14 50. As a further direct, proximate, and foreseeable result
15 of the conduct of defendants, as set forth above, Plaintiff has
16 suffered and continue to suffer from humiliation, mental anguish,
17 fear, and emotional and physical distress, all to his damage in
18 an amount to be proven at trial.

19 51. Defendants, and each of them, acted with fraud, malice
20 and in conscious disregard for the rights of Plaintiff thereby
21 entitling Plaintiff to punitive damages in an amount to be proven
22 at trial.

23 **FOURTH CAUSE OF ACTION**
24 (Breach of Contract)

25 52. Plaintiff realleges and incorporates the allegations
26 contained in all paragraphs above, as though fully set forth
27 herein

28 53. On or about December 2, 2003, the Brays entered into a

1 written agreement with Kendall to purchase the Property.

2 54. Implied in such agreement is a covenant of good faith
3 and fair dealing, which requires that neither party do anything
4 to deprive the other of the benefits of the contract.

5 55. If any Mexican capital gains taxes are due, such taxes
6 would be the responsibility of Kendall.

7 56. Defendants have refused to do the acts necessary to
8 consummate the sale so that title can be transferred to the Brays
9 through a Bank Trust.

10 57. Defendants have breached the Agreement by refusing to
11 do all things necessary to consummate the transaction.

12 58. The Brays have performed all conditions, covenants and
13 promises required by them to be performed in accordance with the
14 terms and conditions of the contract.

15 59. As a result of defendants', and each of their, breach
16 of contract, Plaintiff has been damaged in an amount to be proven
17 at trial.

18 **FIFTH CAUSE OF ACTION**
19 **(Specific Performance)**

20 60. Plaintiff realleges and incorporates the allegations
21 contained in all paragraphs above, as though fully set forth
22 herein.

23 61. The consideration paid by the Brays for the Property is
24 the fair and reasonable value of the Property, and said contract
25 is, as to Kendall, just and reasonable.

26 62. The Brays have performed all conditions, covenants and
27 promises required by them to be performed in accordance with the
28 terms and conditions of the contract.

1 63. Kendall and his agents have refused and continue to
2 refuse to execute the documents to consummate the transaction so
3 that title can be transferred to Plaintiff.

4 **SIXTH CAUSE OF ACTION**
5 (Wire Fraud/RICO)

6 64. Plaintiff realleges and incorporates the allegations
7 contained in all paragraphs above, as though fully set forth
8 herein.

9 65. Plaintiff is informed and believes and on that basis
10 alleges that defendants Kendall, Elias and Pullen are persons a
11 defined by 18 U.S.C. §1961.

12 66. Plaintiff is informed and believes and on that basis
13 alleges that defendants, being employed by and/or associated with
14 an enterprise engaged in the activities of which affected
15 interstate and foregoing commerce, willfully and knowingly did
16 conduct and participate, directly and indirectly, in the conduct
17 of the affairs of such enterprise through a pattern of
18 racketeering activity in violation of 18 U.S.C. §1962.

19 67. Plaintiff is informed and believes and on that basis
20 alleges that the enterprise whose affairs were conducted through a
21 pattern of racketeering activity, PV and WCA, are business
22 entities as defined by 18 U.S.C. §1961(4).
23

24 68. Plaintiff is informed and believes and on that basis
25 alleges that the pattern of racketeering activity engaged in by
26 the defendants, as defined in 18 U.S.C. §1961, consisted of the
27 following: fraud in the sale of real estate, fraud in the
28

1 failure to pay taxes, acts of mail fraud in violation of 18
2 U.S.C. §1341 and acts of wire fraud in violation of 18 U.S.C.
3 §1343.

4 69. As a direct and proximate result of the pattern of
5 racketeering activity described herein, Plaintiff has been
6 damaged in an amount to be proven at the time of trial.

7
8 70. Pursuant to 18 U.S.C. §1964(c), Plaintiff is entitled
9 to trebled the damages alleged above and proved at the time of
10 trial. Further, Plaintiff is entitled to such injunctive and
11 equitable relief provided for under 18 U.S.C. §1964(a) as the
12 Court may deem just and proper.

13 71. Pursuant to 18 U.S.C. §1964(c) Plaintiff is entitled to
14 recover the cost of suit and reasonable attorney fees.

15 **SEVENTH CAUSE OF ACTION**
16 (Conversion)

17 72. Plaintiff realleges and incorporates the allegations
18 contained in all paragraphs above, as though fully set forth
19 herein.

20 73. Defendants, and each of them, have converted the sum of
21 \$440,500 that the Brays wire transferred in exchanged for the
22 Property.

23 74. Plaintiff has and continues to expended time and funds
24 in an amount in to be proven at trail to retrieve the money or
25 obtain their interest in the Property.

26 75. As a proximate result of the foregoing, Plaintiff has
27 and will continue to sustain damages in an amount to be proven at
28 trial.

1 76. In doing the acts, alleged above, defendants, and each
2 of them, acted maliciously and oppressively towards Plaintiff,
3 and by reason thereof, Plaintiff is entitled to exemplary or
4 punitive damages in an amount according to proof.

5 **EIGHTH CAUSE OF ACTION**
6 (Negligence)

7 77. Plaintiff realleges and incorporates the allegations
8 contained in all paragraphs above, as though fully set forth
9 herein.

10 78. As a result of the negligence and carelessness of
11 defendants, and each of them, Plaintiff has been damaged as set
12 forth above.

13 79. In doing the acts, alleged above, defendants, and each
14 of them, acted maliciously and oppressively towards Plaintiff,
15 and by reason thereof, Plaintiff is entitled to exemplary or
16 punitive damages in an amount according to proof.

17 **NINTH CAUSE OF ACTION**
18 (Declaratory Relief)

19 80. Plaintiff realleges and incorporates the allegations
20 contained in all paragraphs above, as though fully set forth
21 herein.

22 81. Plaintiff is informed and believes and thereupon
23 alleges that Defendants, and each of them, Defendants are
24 required to cooperate to close the transaction whereby the Brays
25 purchased the Property and Defendants, and each of them, refuse
26 to do so unless the Brays assumed responsibility for payment of
27 any Mexican capital gains taxes owed by Kendall.

28 81. An actual controversy exists.

1 82. Plaintiff seeks an order declaring that he is entitled
2 to be the beneficiary of the bank trust with respect to the
3 Property with no obligation to pay any Mexican capital gains
4 taxes and that defendants, and each of them, be directed to take
5 all steps to transfer their interest in the Property to
6 Plaintiff.

7 WHEREFORE, Plaintiff prays for judgment against Defendants
8 as set forth below:

9 1. For an order declaring the respective rights and
10 obligations of the parties with respect to the Property.

11 2. For and order compelling Defendants and, their respective
12 agents, representatives, and anyone acting on their behalf or at
13 their direction, directly or indirectly, to do all things
14 necessary to transfer their interest in the Property to
15 Plaintiff;

16 3. For restitution and equitable relief, including
17 disgorgement of moneys received as allowed under the law;

18 4. For specific performance of the contract to sell the
19 Property;

20 5. For an award of special damages in an amount according
21 to proof;

22 6. For an award of general damages in an amount according to
23 proof;

24 7. For an award of punitive damages in an amount according
25 to proof;

26 8. For costs of suit incurred herein, including an award of
27 attorney; and,

28 9. For such other further relief as the Court deems just and

proper.

Dated: January 22, 2008

LAW OFFICES OF ROBERT F. KANE
Attorneys for Plaintiff
LELAND H. BRAY

By: 

ROBERT F. KANE

DEMAND FOR JURY TRIAL

Plaintiff Leland H. Bray demands a trial by jury of the
above entitled case.

Dated: January 22, 2008

LAW OFFICES OF ROBERT F. KANE
Attorneys for Plaintiff
LELAND H. BRAY

By: 

ROBERT F. KANE